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Supreme Court, U.S.
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Nos. 00-445, 00-632 and 00-638

In The

Supreme Court of the United States

STATE OF MICHIGAN, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION OF ENVIRONMENTAL INTERVENORS

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether EPA may, under Sections 110(a)(2)(D) and 110(k)(5) of the Clean Air Act, consider cost as one of several factors in determining the amount of emissions reductions that a state must make to adequately mitigate emissions that are significantly contributing to another state's failure to attain a national ambient air quality standard.

2. Whether EPA's action in considering cost as a factor under Sections 110(a)(2)(D) and 110(k)(5) represents a constitutionally permissible exercise of the authority delegated to EPA by Congress.

PARTIES TO THE PROCEEDINGS

1. The following Parties were petitioners in the consolidated proceeding before the U.S. Court of Appeals for the District of Columbia Circuit, the judgment in which review is sought.

In No. 98-1497, State of Michigan, Michigan Department of Environmental Quality and State of West Virginia, Division of Environmental Protection.
In No. 98-1588, State of Ohio.
In No. 98-1596, Commonwealth of Virginia.
In No. 98-1615, State of Alabama, *ex. rel.* Bill Pryor, Attorney General.
In No. 98-1617, State of Indiana and Indiana Department of Environmental Management.
In No. 98-1619, State of North Carolina.
In No. 98-1621, State of South Carolina.
In No. 98-1499, United Mine Workers of America.
In No. 98-1500, Appalachian Power Company, *et al.*, consisting of:
Appalachian Power Company;
Baltimore Gas and Electric Company (now referred to as Constellation Power Source Generation, Inc.);
Carolina Power & Light Company;
Central and South West Services, Inc.:
Central Power and Light Company;
Public Service Company of Oklahoma;
Southwestern Electric Power Company;
West Texas Utilities Company;
Central Illinois Light Company;
Central Illinois Public Service Company;
CINergy;
Columbus Southern Power Company;

PARTIES TO THE PROCEEDINGS – Continued

Commonwealth Edison Company;
Consumers Energy Company;
Dayton Power and Light Company, The;
Detroit Edison Company, The;
Duke Energy Company;
Florida Power Corporation;
Illinois Power Company;
Indiana Michigan Power Company;
Jacksonville Electric Authority;
Kentucky Power Company;
Kentucky Utilities Company;
Louisville Gas and Electric Company;
Madison Gas and Electric Company;
Minnesota Power Company;
Monongahela Power Company, d/b/a Allegheny Power System, Inc.
Northern Indiana Public Service Company;
Oglethorpe Power Corporation;
Ohio Power Company;
Ohio Valley Electric Corporation;
Oklahoma Gas & Electric Company;
Otter Tail Power Company;
PacifiCorp Electric Operations;
Plains Electric Generation & Transmission Cooperative, Inc.;
Potomac Edison Company, The, d/b/a Allegheny Power System, Inc.;
Potomac Electric Power Company;
Public Service Company of New Mexico;
Salt River Project;
South Carolina Electric & Gas Company;
Southern Company:
Alabama Power Company;
Georgia Power Company;
Gulf Power Company;

PARTIES TO THE PROCEEDINGS – Continued

Mississippi Power Company;
Savannah Electric and Power Company;
Tampa Electric Power Company;
Tucson Electric Company;
Union Electric Company;
Virginia Power;
West Penn Power Company, d/b/a Allegheny Power System, Inc.;
Edison Electric Institute;
National Rural Electric Cooperative Association; and
American Public Power Association.

In No. 98-1500, Duquesne Light Company.

In No. 98-1501, Midwest Ozone Group.

In No. 98-1502, West Virginia Chamber of Commerce.

In No. 98-1504, National Mining Association.

In No. 98-1518, West Virginia Manufacturers Association.

In No. 98-1556, City of Springfield, Missouri through the Board of Public Utilities, d/b/a City Utilities of Springfield, Missouri.

In No. 98-1567, Kansas City Power & Light Company;
St. Joseph Light & Power Company;
The Empire District Electric Company;
Utilicorp United, Inc.;
City of Independence, Missouri; and
Associated Electric Cooperative, Inc.

In No. 98-1573, Indianapolis Power & Light Company.

In No. 98-1585, The Alabama Forestry Association, Inc., by and through its section The Alabama Pulp and Paper Counsel.

In No. 98-1590, Dairyland Power Cooperative.

PARTIES TO THE PROCEEDINGS – Continued

In No. 98-1598, South Carolina Public Service Authority, d/b/a Santee Cooper.
In No. 98-1601, American Municipal Power-Ohio.
In No. 98-1602, Fort James Operating Company;
Gilman Paper Company;
Rayonier, Inc.;
Savannah Electric & Power Company;
Southeast Paper Manufacturing Company; and
International Paper Company.
In No. 98-1608, PP&L, Inc.
In No. 98-1609, Council of Industrial Boiler Owners.
In No. 98-1611, Network for Workable Air Policies.
In No. 98-1616, Georgia Coalition for Sound Environmental Policy, Inc.
In No. 98-1618, Interstate Natural Gas Association of America.
In No. 99-1070, Appalachian Power Company, *et al.*
In No. 99-1093, Wisconsin Paper Council;
Madison Gas and Electric Company;
Northern States Power Company;
Wisconsin Public Service Corporation; and
Wisconsin Manufacturers & Commerce.

2. The following Party was a Respondent in the consolidated proceeding before the U.S. Court of Appeals for the District of Columbia Circuit, the judgment in which review is sought.

U.S. Environmental Protection Agency.

3. The following Parties were Intervenors in the consolidated proceeding before the U.S. Court of Appeals for the District of Columbia Circuit, the judgment in which review is sought.

Natural Resources Defense Council;
Environmental Law & Policy Center of the Midwest;

PARTIES TO THE PROCEEDINGS – Continued

American Lung Association of Metropolitan Chicago;
Appalachian Mountain Club;
Citizens Action Coalition of Indiana, Inc.;
Clean Air Council;
Environmental Defense Fund (now referred to as Environmental Defense);
Group Against Smog and Pollution;
Hoosier Environmental Council;
Illinois Environmental Council;
Izaak Walton League of America;
Legal Environmental Assistance Foundation;
Michigan Environmental Council;
National Environmental Trust;
Natural Resources Council of Maine;
New York Public Interest Research Group;
Ohio Citizen Action;
Ohio Environmental Council;
U.S. Public Interest Research Group; and
Wisconsin's Environmental Decade Institute.

State of New York;
State of Connecticut;
State of Maine;
Commonwealth of Massachusetts
State of New Hampshire;
Commonwealth of Pennsylvania;
State of Rhode Island; and
State of Vermont.

State of Maryland.

State of Wisconsin.

Province of Ontario, Canada;
Norman W. Sterling, Minister of the Environment, Province of Ontario;

PARTIES TO THE PROCEEDINGS – Continued

Charles A. Harnick, Attorney General of the Province of Ontario; and
Christopher Carl Haromy.

Appalachian Power Company, *et al.*
(listed in paragraph 1. *supra*).

Dairyland Power Cooperative.

Virginia Manufacturers Association.

South Carolina Public Service Authority, d/b/a Santee Cooper.

Detroit Public Lighting;
Grand Haven Board of Light and Power;
Holland Board of Public Works;
Lansing Board of Water and Light;
Marquette Board of Light and Power;
Michigan South Central Power Agency; and
City of Wyandotte Department of Municipal Service.

GPU Generation, Inc.

American Gas Association.

Interstate Natural Gas Association of America.

Network for Workable Air Policies.

Business Council of Alabama.

Michigan Manufacturers Association.

Consolidated Edison Co. of New York, Inc.;
KeySpan Generation LLC;
Niagara Mohawk Power Corporation;
PECO Energy Company;
Public Service Electric and Gas Company;
Rochester Gas & Electric Corporation; and
PG&E Generating.

PARTIES TO THE PROCEEDINGS – Continued

Natural Gas Supply Association; and
Sempra Energy.

Associated Industries of Massachusetts;
New England Council; and
New Jersey State Chamber of Commerce.

PP&L, Inc.;
Atlantic City Electric Company; and
Delmarva Power & Light Company.

4. The following were *Amici* in the consolidated proceeding before the U.S. Court of Appeals for the District of Columbia Circuit, the judgment in which review is sought.

Government of Canada.

North Carolina Citizens for Business and Industry.

South Carolina Chamber of Commerce;
Environmental Management Association of South Carolina; and
South Carolina Manufacturers Alliance.

Toledo Metropolitan Area Council of Governments.

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BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

INTRODUCTION

Three petitions for certiorari have been filed seeking review of portions of a March 3, 2000 decision of the United States Court of Appeals for the District of Columbia ("D.C. Circuit").[1] That decision largely upheld the Environmental Protection Agency's ("EPA's" or the "Agency's") 1998 rule requiring reductions in nitrogen oxide ("NOx") emissions in 22 states and the District of Columbia that EPA found to be "contributing significantly" to the failure of many states in the Eastern United States to attain the 1-hour ozone National Ambient Air Quality Standard ("NAAQS"). "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone," 63 Fed. Reg. 57,356 (Oct. 27, 1998) (hereinafter "NOx SIP Call Rule" or "Rule"). In particular, the D.C. Circuit held that EPA, in determining the level of emissions that were contributing significantly to downwind nonattainment and thus needed to be reduced, properly considered the costs of controlling those emissions. All three petitions seek review of this finding on the grounds that it violates the Clean Air Act (the "Act"), although Petitioners do not agree on what approach Congress intended EPA to take. The States of Michigan, Alabama, West Virginia, Virginia

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[1] *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000) (*"Michigan"*), *reprinted at* Appendix of the Petition for a Writ of Certiorari of Appalachian Power Co., *et al.* (No. 00-445, Sept. 20, 2000) ("Ind. Pet., App.")

and South Carolina ("Michigan") (No. 00-632) assert that EPA cannot consider costs at all. The States of Ohio and Indiana ("Ohio") (No. 00-633), on the other hand, claim that EPA may consider costs, but only as a "subordinate factor."[2] Finally, a group of industries and industry trade associations led by Appalachian Power Company ("Industry" or "Industry Petitioners") (No. 00-445) claim that EPA may not consider costs when determining "significant contribution," but may do so when determining how much of that contribution must be eliminated. Industry Petitioners also claim that EPA's consideration of cost factors violated the so-called "non-delegation" doctrine.

Environmental group intervenor-respondents in the D.C. Circuit case below[3] respectfully submit that none of

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[2] State petitioners below were Ohio, Indiana, Michigan, Alabama, South Carolina, Virginia, West Virginia and North Carolina. These states combined their efforts in briefing and arguing the case before the D.C. Circuit. North Carolina has not filed a petition for certiorari with this Court, and Ohio and Indiana have filed a petition separate from that filed by Michigan, Alabama, South Carolina, Virginia and West Virginia.

[3] Environmental organizations participating as intervenor-respondents in the case below, and who join in this Opposition are: American Lung Association of Metropolitan Chicago, Appalachian Mountain Club, Citizens Action Coalition of Indiana, Clean Air Council, Environmental Defense (formerly known as Environmental Defense Fund), Environmental Law & Policy Center of the Midwest, Group Against Smog and Pollution ("GASP"), Hoosier Environmental Council, Illinois Environmental Council, Izaak Walton League of America, Legal Environmental Assistance Foundation, Michigan Environmental Council, National Environmental Trust, Natural Resources Council of Maine, Natural Resources Defense

these petitions merit this Court's review. There is no conflict between the D.C. Circuit's decision and decisions of this Court or other federal appellate courts. The D.C. Circuit's resolution of the questions presented in the certiorari petitions is amply supported by applicable precedent and is correct.

STATEMENT OF THE CASE

Petitioners' Statements describe EPA's authority to implement the NAAQS for ozone through issuance of a "SIP call" under Clean Air Act Section 110(k)(5), by which the EPA Administrator may find inadequate state implementation plans ("SIPs") and require states to revise such SIPs to correct the deficiencies. 42 U.S.C. § 7410(k)(5). One of the possible bases for a SIP call is an EPA finding under Section 110(a)(2)(D)(i)(I) of the Act that a SIP does not contain adequate provisions to prohibit air pollution in that state "in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance [of a NAAQS] by, any other State." 42 U.S.C. § 7410(a)(2)(D)(i)(I). These provisions are designed to ensure that the cumulative impacts of many states' upwind air pollution do not foul the air downwind so badly that any downwind state is forced to bear more than its share of the burden of ensuring that its air does not violate the NAAQS; or alternatively, bear more than

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Council, New York Public Interest Research Group, Ohio Citizen Action, Ohio Environmental Council, U.S. Public Interest Research Group, and Wisconsin's Environmental Decade Institute.

its share of the public health consequences of dirty air. *See* S.Rep. No. 95-127 at 41-42, *reprinted in* 3 A Legislative History of the Clean Air Act Amendments of 1977 ("1977 Leg. Hist.") 1415-16 (Comm. Print 1978).

In the case of the ozone NAAQS, each upwind area contributes to the total ozone burden in downwind areas in many states. 63 Fed.Reg. 57,356, 57,394-396, Tables II-4 to II-7. Put another way, because of the nature of ozone pollution and its transport, the pollution in any upwind area will impact the area and the state immediately downwind as well as more distant states.

Ozone is formed when NOx and volatile organic compounds ("VOCs") interact in the presence of sunlight. Once ozone has been created, it drifts downwind, along with its NOx precursor (VOCs are very localized in their effects, and are not transported with the air mass to any great extent). *Id.* at 57,381. The D.C. Circuit has correctly recognized that "as the air mass moves [downwind], ozone levels often continue to increase, in part because ozone has more time to develop, in part because the air mass picks up more precursors along the way. Ultimately, this process can bring high ozone levels to areas hundreds of miles downwind of the pollution sources." *Virginia v. EPA*, 108 F.3d 1397, 1400, *modified on reh'g on other grounds*, 116 F.3d 499 (D.C. Cir. 1997). The creation of downwind ozone pollution therefore is non-linear and cumulative.[4] For each separate meteorological ozone

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[4] Petitioners argue that NOx, the precursor chemical primarily associated with transported ozone, both creates and destroys ozone. Ind. Pet. at 8 & n. 4. This statement is incorrect – although strictly localized increases in ozone can occur in areas immediately adjacent to facilities which reduce their NOx

event, downwind areas receive ozone and NOx from many upwind states, and each upwind area contributes to downwind pollution events in many different states. 63 Fed. Reg. 57,356, 57,394-396.

The NOx SIP Call Rule was a partial response – five years overdue – to the mandate contained in the 1990 Clean Air Act that all states with ozone serious nonattainment areas must adopt plans no later than November 1994 to correct the nonattainment problem. 42 U.S.C § 7511a(c)(2). As part of a negotiated stay of litigation over EPA's extensions to states of the statutory attainment demonstration deadlines, the Ozone Transport Assessment Group ("OTAG") was created. 62 Fed. Reg. 60,318, 60,323 (Nov. 7, 1997). In OTAG, 37 states came together to complete regional modeling and reach regional solutions to the interstate ozone transport problem. The technical work done by OTAG utilized "the most complete, scientifically-credible tools and data available" (*id.* at 60,331), and included state-of-the-art air quality modeling, at the regional and subregional levels, to which EPA added state-specific refinements. 63 Fed. Reg. 57,356, 57,387, 57,390-391.

The combination of the cumulative, nonlinear nature of ozone production and the Agency's statutorily-defined duty under Sections 110(a)(2)(D)(i)(I) and 110(k)(5) of the Act meant that EPA, faced with OTAG's indisputable

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emissions, it is not correct to say that NOx "destroys" ozone in any sense. Indeed, *transported* ozone – the subject of the EPA Rule and this case, does not decrease when NOx emissions are increased; rather transported ozone decreases when NOx emissions are *decreased*. *See* 63 Fed. Reg. 57,356, 57,424-425, 57,439-441.

evidence of pollutant transport across state lines, was required to distribute responsibility among all the upwind states to adopt controls on sources contributing to ozone nonattainment and maintenance problems in all downwind states.

EPA implemented the OTAG findings, making a state-by-state assessment of emissions contributions to downwind nonattainment and maintenance problems, and apportioning responsibility for the needed NOx reductions based on the emissions modeling and the availability of additional highly cost-effective controls in each of the states. *Id.* at 57,376-378, 57,389-391. From this multi-faceted analysis, EPA developed state-by-state NOx emissions "budgets," which each state may meet by any means available to it. *Id.* at 57,426.

State and Industry Petitioners challenged EPA's resulting NOx SIP Call Rule in the D.C. Circuit, alleging that the Agency's consideration of the availability of cost-effective control measures in defining significant contributions from upwind to downwind states violated the Clean Air Act. State Petitioners also argued that EPA's actions violated the Constitutional non-delegation doctrine.

The D.C. Circuit upheld the EPA Rule on both counts, noting that the term "significant" does not require an unidimensional (health only) analysis, and that the various petitioners were not only in conflict over this point, but had "conspicuously fail[ed] to describe the intellectual process by which EPA would determine 'significance' if it may consider only health." Ind. Pet., App. at 21a, 22a. The court went on to hold that there is nothing in the D.C. Circuit's case law, or in "the text, structure, or

history of the Clean Air Act that bars EPA from considering cost" in this analysis. Ind. Pet., App. at 25a.

On the non-delegation question, the State Petitioners did not allege that the Clean Air Act itself violated the non-delegation doctrine, but rather challenged as an unbounded exercise of Agency discretion the EPA's action in selecting the $2000/ton cost-effectiveness point as an element of the significance determination. The D.C. Circuit upheld the Agency's action against this charge, noting that the non-delegation doctrine is itself limited in its application. It was significant to the court that the Agency's action was both constrained by the statutory factors of the significance analysis, and limited geographically, so that the scope of the Rule did not " 'encompass all American enterprise'." Ind. Pet., App. at 27a-28a (quoting *International Union, UAW v. OSHA ("Lockout/Tagout I")*, 938 F.2d 1310, 1317 (D.C. Cir. 1991)). The D.C. Circuit refused requests for rehearing *en banc*, over a single dissent.[5]

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[5] Judge Sentelle dissented, as he had on the merits. Judges Tatel and Garland did not participate in considering whether to grant rehearing *en banc*. Order Denying Reh'g *En Banc* in No. 98-1497 and consolidated cases, June 22, 2000, *reprinted at* Ind. Pet., App. at 64a.

REASONS FOR REJECTING THE PETITIONS FOR REVIEW

I. THIS COURT SHOULD DENY CERTIORARI ON THE "SIGNIFICANT CONTRIBUTION" QUESTIONS.

The only question raised by the Petitions of Ohio and Michigan, and the primary one raised by that of Industry, is whether – or how much – EPA may consider cost as a factor in finding that certain sources are producing NOx emissions that "contribute significantly" to nonattainment in another state within the meaning of Section 110(a)(2)(D)(i)(I) of the Act. As discussed *infra* at Section I.B., Congress did not define the term "contribute significantly." Therefore, EPA's interpretation of the term is entitled to considerable weight under the settled law of this Court, and should be upheld unless it is impermissible. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984) (*"Chevron"*). In other words, this is a case that is properly decided under "step two" of the *Chevron* analysis, not "step one." The D.C. Circuit's decision finding permissible EPA's inclusion of cost in the factors considered in determining the significance level of upwind state contributions to downwind nonattainment is completely consistent with the established case law of this Court and the Courts of Appeals.

As the D.C. Circuit noted, in the proceeding below neither the State nor Industry Petitioners could make up their minds as to whether or how Congress intended EPA to consider cost in determining what contributions to nonattainment are "significant." *See* Ind. Pet., App. at

17a-20a. Initially, the States argued that EPA could consider cost, but could not make it the controlling factor in determining significance. *Id.* However, "[a]t oral argument, counsel for the States abandoned this position and decided that the statute flatly prohibits EPA from considering costs at all." Ind. Pet., App. at 18a-19a. On the other hand, Industry initially argued below that EPA could consider only "air quality impacts," not costs. Industry presented a different position at oral argument, however, claiming that while EPA could not consider costs under Section 110(a)(2)(D) of the Act (in determining whether a SIP prohibits emissions from sources that "significantly contribute" to nonattainment), it nevertheless could consider costs under Section 110(k)(5) (in determining whether a SIP is "adequate"). Ind. Pet., App. at 20a.

Petitioners still do not agree on how Congress intended EPA to treat costs in issuing a "SIP call" under Sections 110(a)(2)(D) and 110(k)(5) of the Act, presenting three inconsistent positions to this Court. Industry's Petition argues that EPA may consider cost in determining the proper level of emission reductions required to correct an interstate pollution transport problem, but only under Section 110(k)(5)'s adequate mitigation language and not under Section 110(a)(2)(D)'s significant contribution language. Ind. Pet. at 13, 18. The State Petitions now contain two distinct variations of the cost argument. The Michigan Petition argues that EPA cannot consider cost at all. Michigan Pet. at 12-13, 19. On the other hand, the Ohio Petition appears to argue that cost may be a factor in EPA's determination of what contributions are significant, but only a subordinate factor. Ohio Pet. at 11, 15. Different petitioners have the right, of course, to raise

different theories of their case. But in this case these disparate interpretations raise the obvious question – if Congressional intent here is so clear, then why can't Petitioners agree on what that intent was?

A. The D.C. Circuit's Holding that EPA's Interpretation of "Significant Contribution" is Permissible Does Not Conflict with the Decisions of this Court or with Other Decisions of the D.C. Circuit.

Petitioners claim that the D.C. Circuit's decision upholding EPA's consideration of cost as a factor in determining when a contribution to downwind nonattainment is "significant" conflicts with various decisions of this Court and other decisions of the D.C. Circuit. Petitioners are wrong.

First, Petitioners claim that the lower court's decision conflicts with the decision of this Court in *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976) (*"Union Electric"*). *See* Michigan Pet. at 14-19. However, *Union Electric* is not on point here. In that case, this Court was faced with a polluter's challenge to EPA's approval of a SIP on the grounds that EPA was required to consider whether the state's choice of controls in the SIP were economically or technologically infeasible. This Court upheld EPA's position[6] that it was not authorized to reject a SIP on such grounds, finding that Congress had set out minimum requirements that a SIP must meet in order to obtain EPA approval, and

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[6] The Court noted that "we have previously accorded great deference to the Administrator's construction of the Clean Air Act [citations omitted]." *Union Elec.*, 427 U.S. at 256.

that the three-year deadline for achieving the NAAQS set by Congress "leaves no room for claims of technological or economic infeasibility." *Union Elec.*, 427 U.S. at 256-260. The Court stated that the Act's minimum compliance requirements are of a "technology-forcing" nature, and "are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible." *Id.* at 257. The Court also made clear, however, that as long as a state plan would achieve attainment and meet the minimum requirements of the Act, the states were free to choose particular measures needed to accomplish that task, and were free to consider infeasibility claims in so doing. *Id.* at 260-265. Indeed, the Court stated explicitly that "we do not hold that claims of infeasibility are never of relevance in the formulation of an implementation plan. . . . " *Id.* at 266.

The instant case is entirely different from *Union Electric*. Neither the EPA nor the Court is faced here, as the Court was in *Union Electric*, with the implications of the "technology-forcing" character of the Act's attainment requirements. We are not concerned here with the question of whether all measures that are or could be contained in an implementation plan will in the aggregate be adequate to achieve timely attainment of the ozone NAAQS,[7] or whether additional measures that may not

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[7] As the Court recognized in *Union Electric*, "the [Act does] allow claims of technological and economic infeasibility to be raised in situations where consideration of such claims will not substantially interfere with the primary congressional purpose of prompt attainment of the national standards." *Union Elec.*, 427 U.S. at 266.

be technologically or economically feasible must be included in such a plan.

Attainment of the NAAQS in a state impacted by emissions transported across its borders requires a combination of in-state and upwind state emission control measures. Section 110(a)(2)(D) does not place the entire burden of downwind attainment on upwind states, because it does not require the elimination of all upwind emissions necessary for a downwind state to achieve attainment.[8] If it did, *Union Electric* might well prohibit EPA from considering cost in determining the level of required upwind emission reductions, at least if the effect of such consideration would be the failure to achieve downwind attainment. Here, however, Congress has authorized EPA to require the elimination of some – but not all – upwind emissions, specifically those that "contribute significantly" to downwind attainment problems. In this sense, Section 110(a)(2)(D)(i)(I) is similar to other provisions in the Act that specifically target certain emissions or emission sources that represent but a portion of the overall reductions necessary to achieve attainment. In the context of such specific implementation measures, EPA has often been permitted, and in some cases,

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[8] EPA so stated in the NOx SIP Call Rule, noting that even after implementation of its rulemaking reducing upwind emissions, some downwind areas will require additional local reductions. *See*, 63 Fed. Reg. 57,356, 57,374, 57,377, 57,403.

required, to consider issues of technological and economic feasibility, or of cost or cost-effectiveness.[9]

Furthermore, unlike *Union Electric*, this case does not involve a claim that a state's choice of emission controls in its implementation plan is technologically or economically infeasible. Indeed, this case does not deal with a state's choice of emission controls at all. Rather, this case involves EPA's interpretation of its own authority to find that a state has failed to control interstate emissions as mandated by Congress and to impose a remedy for that failure.[10] Finally, the present case does not deal with claims of technical or economic infeasibility, but rather

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[9] For cases in which the D.C. Circuit has found that EPA can lawfully consider costs in Clean Air Act rulemaking, *see, e.g., George E. Warren Corp. v. EPA*, 159 F.3d 616 (D.C. Cir. 1998), *amended on other grounds*, 164 F.3d 676 (D.C. Cir. 1999) (examining Clean Air Act Section 211, 42 U.S.C. § 7545, providing for the regulation of reformulated gasoline); *NRDC v. EPA*, 937 F.2d 641 (D.C. Cir. 1991) (upholding EPA's use of cost-benefit analysis to determine that a particular polluting source should not be classified as "major" under Section 165 of the Act, 42 U.S.C. § 7475).

Congress also has specifically allowed or required EPA to consider costs in connection with a variety of specific emission reduction measures; *see, e.g.*, 42 U.S.C. § 7521(a)(3)(A)(i) (mobile source standards); 42 U.S.C. § 7545(c)(2)(B) (fuel additive regulation); 42 U.S.C. § 7411(a)(1), (b)(1) (certain new stationary source standards); 42 U.S.C. § 7547(a)(3) (nonroad vehicle compliance deadlines); 42 U.S.C. § 7571(b) (aircraft compliance deadlines); and 42 U.S.C. § 7511b(b)(3) and (4), (e)(1) (certain control techniques guidelines for VOCs).

[10] This Court in *Union Electric* explicitly did not reach the question of whether EPA could consider factors of economic or technical infeasibility in drafting its own implementation plan where a state fails to do so. *Union Elec.*, 427 U.S. at 261, n.7.

with issues of cost and cost-effectiveness.[11] For all of the above reasons, *Union Electric* does not conflict with the lower court's holding here.[12]

The decision of the D.C. Circuit in this case furthermore does not conflict with other decisions of that court.[13] First of all, contrary to the claims of Michigan Petitioners, there is no conflict with *American Trucking Ass'ns v. Browner*, 175 F.3d 1027, *modified on reh'g*, 195 F.3d

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[11] In another Clean Air Act case presently before this Court, *American Trucking Ass'ns v. Browner*, No. 99-1426, several industry petitioners recently argued that *Union Electric* "never mentions cost-benefit analysis," and "could not be clearer that it dealt only with 'technological and economic infeasibility.' " Reply Brief for Cross-Petitioners (ATA, et al.) in No. 99-1426, at 16-17 (Oct. 6, 2000) (citation omitted).

[12] Several other opinions of this Court mentioned in passing by Industry do not support its arguments here. *See* Ind. Pet. at 16-17. First, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) was concerned with retroactive agency rulemaking under the Medicare program, and is not relevant here because EPA's NOx SIP Call Rule is not retroactive rulemaking. Nor is *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607 (1980) of any assistance to Petitioners. In that case, a divided Court struck down the Secretary of Labor's proposed benzene regulations, finding that "Congress was concerned, not with absolute safety, but with the elimination of significant harm." *Id.* at 646. Indeed, the Court found that the statutory requirement that the Secretary conduct "some cost-benefit analysis" prior to setting a standard manifested the intention of Congress that the Secretary must find a "significant risk of harm." *Id.* at 644. The Court clearly did not find that the Secretary could not consider costs in setting a standard.

[13] We note that there was not a close split of D.C. Circuit judges in this case. Indeed, only a single judge would have granted the petitions for *en banc* rehearing. Ind. Pet., App. at 64a-65a.

4 (D.C. Cir. 1999), *cert. granted*, 120 S.Ct. 2003, 2193 (2000) (Nos. 99-1426, 99-1257) (*"ATA"*), or *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980) (*"Lead Industries"*). Neither *ATA* nor *Lead Industries* is relevant to the present case, as both were concerned with the promulgation of NAAQS under Section 109 of the Act, 42 U.S.C. § 7409, not the implementation of the resulting standards.[14] These two cases are part of a long line of D.C. Circuit cases that have consistently found that "[t]he statute and its legislative history make clear that economic considerations play no part in the promulgation of ambient air quality standards under Section 109." *Lead*

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[14] The plain language of Section 109(b)(1) makes clear that the NAAQS must be set "based on" "air quality criteria" established under Section 108, 42 U.S.C. § 7408, and must be "requisite to protect the public health." 42 U.S.C. § 7409(b)(1). The air quality criteria, in turn, "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities." 42 U.S.C. § 7408(a)(2). The Act's legislative history provides clear evidence that Congress intended EPA to be limited to public health considerations when setting NAAQS. Thus, both the statute and legislative history provide that the establishment of the primary, health-based, NAAQS are confined to public health considerations. *See* Brief of Cross-Respondent American Lung Ass'n in *ATA*, No. 99-1426 (September 8, 2000). Further, Congress has ratified this long-standing interpretation of EPA's authority to establish NAAQS through repeated legislative proceedings over the past three decades in which it has considered and rejected initiatives to provide for the consideration of costs in establishing the NAAQS. *See* Brief of *Amici Curiae* Environmental Defense, American Public Health Association, *et al.* on Behalf of Cross-Respondents, in *ATA* No. 99-1426, at 5-15 (September 11, 2000).

Indus., 647 F.2d at 1148. *See also, e.g., American Petroleum Inst. v. Costle*, 665 F.2d 1176, 1185 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1034 (1982); *NRDC v. EPA*, 902 F.2d 962, 973 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991); and *American Lung Ass'n v. EPA*, 134 F.3d 388, 389 (D.C. Cir. 1998). Because Congress has often – both explicitly and implicitly – authorized EPA to consider cost-related factors in *implementing* the NAAQS, cases such as *ATA* and *Lead Industries* dealing with the use of such factors in *promulgating* the NAAQS are simply not relevant to the issues raised by Petitioners here.[15] The various D.C. Circuit opinions addressing when EPA may take cost into consideration under different Clean Air Act provisions hardly constitute the "hodge-podge" alleged by Industry. *See* Ind. Pet. at 6. Rather, these cases divide along clear lines – EPA cannot consider costs when promulgating an air quality standard, but may, and in some cases, must, do so in implementing such a standard.[16]

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[15] *See* examples cited at footnote 9, *supra*. We also note that Michigan, *et al.*, argue that "EPA's consideration of costs under § 110(a)(2)(D) is wholly inconsistent with the position the EPA adopted before this Court in the EPA's petition for a writ of certiorari in *ATA*." Michigan Pet. at 8. But, in fact, EPA's positions in *ATA* and in this case are perfectly compatible: ATA deals with the promulgation of the NAAQS under Section 109, where consideration of costs has long and properly been excluded, while the instant case deals with the implementation of the NAAQS, where EPA's consideration of costs have often been upheld.

[16] The D.C. Circuit's opinion in *NRDC v. EPA*, 824 F.2d 1146, 1157 (D.C. Cir. 1987) (*en banc*), referenced in the Industry Petition at 7, was concerned with EPA's establishment of limits on source emissions of hazardous air pollutants under an earlier version of Section 112 of the Act, not with the promulgation of ambient air quality standards under Section 109.

The D.C. Circuit's ruling here also does not conflict with its decision in *Ethyl Corp. v. EPA*, 51 F.3d 1053 (D.C. Cir. 1995) ("*Ethyl*"), as argued by Industry. Ind. Pet. at 17-18. *Ethyl* dealt with Section 211(f)(4) of the Act, 42 U.S.C. § 7545(f)(4), authorizing EPA to grant a waiver from the prohibition on the use of certain fuel additives if the manufacturer could show that the additive "will not cause or contribute to a failure of any emission device or control system . . . to achieve compliance by the vehicle with the emission standards." EPA decided that Ethyl Corporation had made the above showings, but nevertheless denied the waiver on the grounds that EPA could consider other factors such as whether the waiver was consistent with the public interest and the effects of the additive on public health. *Ethyl*, 51 F.3d at 1054-55. Noting that EPA had specifically determined that Ethyl Corporation met the explicit statutory criteria, that EPA's waiver denial was inconsistent with its published guidance and indeed that this was the first waiver case where EPA had considered factors other than those set forth in Section 211(f)(4), the D.C. Circuit held that given the plain meaning of the statute, EPA erred in considering those other factors. *Ethyl*, 51 F.3d at 1056, 1058. In this case, Section 110(a)(2)(D) does not provide a set of exclusive criteria that controls EPA's determination of the level of emissions that "significantly contribute" to downwind nonattainment and must be "adequately mitigated" under Section 110(k)(5). The use by Congress of these undefined terms permits EPA discretion in interpreting them, unlike the very explicit language in Section 211(f)(4) that the court in *Ethyl* determined provided EPA with very little discretion.

B. EPA's Consideration of Costs Under Sections 110(a)(2)(D) and 110(k)(5) Is Permissible Under Established Case Law.

This is not a case where the lower court has committed a clear error of law on an important or novel legal question. Rather, the "significant contribution" issue is easily resolved under the well-established rules of statutory construction set out in *Chevron* and its progeny. Since *Chevron,* federal courts have used a two-part test to review an agency's construction of a statute that it administers. This test is described in *Chevron* as follows:

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. [footnotes omitted].

Chevron, 467 U.S. at 842-43. Furthermore, in examining this second question, *Chevron* provides that the Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . . *Id.* at 844.

The issue raised by Petitioners in this case is whether EPA may consider costs in carrying out its obligations to ensure that SIPs adequately address interstate emissions

under Sections 110(a)(2)(D) and 110(k)(5) of the Act. Congress has not defined the phrase "contribute significantly" in Section 110(a)(2)(D). It has not defined when a SIP is "substantially inadequate" or when a plan will "mitigate adequately" interstate pollution transport within the meaning of Section 110(k)(5). Nor has Congress enumerated the factors that EPA must consider when determining whether a state's emissions contribute significantly to downwind nonattainment or how much emissions reduction is needed to mitigate adequately such contributions. Congress clearly has not prohibited EPA from considering cost factors in making either of these determinations. As mentioned earlier, Petitioners' inability to agree on whether and to what extent Congress did intend EPA to consider costs in requiring interstate emissions reductions pursuant to Sections 110(a)(2)(D) and 110(k)(5) of the Act speaks volumes to the lack of any clear Congressional direction on this issue. As the D.C. Circuit observed, "[a]gainst this backdrop, it would be at the very least ironic for us to say that there is 'clear congressional intent to preclude consideration of cost' under § 110(a)(2)(D)" Ind. Pet., App. at 20a (quoting *NRDC v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987) (*en banc*)). Because Congress has not directly addressed the precise question of whether costs may be considered under Sections 110(a)(2)(D) and 110(k)(5), EPA's resolution of that question is properly reviewed under step two of *Chevron*.

While EPA's interpretation of Sections 110(a)(2)(D) and 110(k)(5) may not be the only possible one, it is a reasonable one and therefore is permissible under *Chevron's* second step. 467 U.S. at 837. EPA considered a

variety of air-quality related factors,[17] based on the most sophisticated modeling available, in addition to the availability of cost-effective controls, in its multi-factor approach to "significant contribution." *See* 63 Fed. Reg. 57,356, 57,376-379. Cost was *not* the sole factor considered.

Furthermore, no one disputes that the failure of many areas in the Eastern United States to attain the ozone standard almost 30 years after it was first promulgated is due to contributions from both local (in-state) and upwind (out-of-state) emissions sources.[18] The basic structure of Section 110(a)(2)(D) requires EPA to include an assessment of the relative level of control efforts in the upwind and downwind states as part of its determination of whether a state's contribution is significant. Unless EPA were to interpret Section 110(a)(2)(D)(i)(I) as prohibiting *all* upwind emissions that impacted downwind nonattainment in any way (an interpretation that no party thus far has advocated in this case), EPA had to interpret the Congressional prohibition of significantly contributing emissions in such a way that, among other things, reasonably allocated responsibility between upwind and

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[17] EPA considered the following air quality factors:

"[t]he overall nature of the ozone problem . . . ;"

"the extent of the downwind nonattainment problems to which the upwind State's emissions are linked, including the ambient impact of controls required under the CAA or otherwise implemented in downwind areas;" and

"the ambient impact of the emissions from the upwind State's sources on the downwind nonattainment problems." 63 Fed. Reg. 57,356, 57,376. *See also* 62 Fed. Reg. 60,318, 60,325.

[18] *See* Ind. Pet. at 8-9; Ohio Pet. at 8.

downwind states, and among different upwind states themselves. EPA's consideration of cost in this context was a perfectly reasonable means to equitably allocate the burden of emissions reductions among the numerous states contributing to the problem.

If EPA did not consider costs and instead adopted a "bright-line" emissions contribution test as urged by some Petitioners,[19] the economic burden of compliance throughout the eastern United States could be quite disparate. Such a test could mean that a downwind state that had already adopted stringent controls would be forced to adopt even more stringent controls while upwind states could escape even basic – and much more cost-effective – controls.[20] On the other hand, if the "bright line" emissions contribution level were set low enough, the reverse could occur – that is, upwind states would bear a disproportionate share of the emissions reductions burden while downwind states would incur no responsibility. Of course, the same disparities could occur between different upwind states as well. In addressing the implications of Petitioners' arguments below, the D.C. Circuit noted that "counsel eventually went so far as to claim that if faced with two states, one of which could eliminate all relevant emissions at a trivial cost, while the other could eliminate none at a cost of less than $5000 a

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[19] *See* Ohio Pet. at 9.

[20] Indeed, EPA found that additional downwind controls would cost about $4300 per ton of NOx removed, while the regional reductions required by EPA's rule would cost only approximately $1500 per ton removed. 63 Fed. Reg. 57,356, 57,379.

ton, EPA must mandate the same cutback for each." Ind. Pet., App. at 19a.

Petitioners provide absolutely no evidence that Congress intended that EPA adopt such an approach to addressing the problem of interstate transport under Sections 110(a)(2)(D) and 110(k)(5). Rather, Congress intended quite the opposite. For example, when Congress added one predecessor to Section 110(a)(2)(D), Senate commenters noted that the new provisions were "intended to equalize the positions of the States with respect to interstate pollution," and to ameliorate previously existing "distinct economic and competitive disadvantage[s]." S. Rep. No. 95-127 at 41-42, *reprinted* in 3 1977 Leg. Hist. 1415-16. Thus, factoring cost-effectiveness into the assessment of significance allowed EPA to respond to dual directives presented it by Congress: prohibit all significant contribution, and take the equities of the situation into account in allocating responsibility for the ozone problem among different states in a region.

II. THERE ARE NO GROUNDS FOR A GRANT OF CERTIORARI ON THE NON-DELEGATION DOCTRINE QUESTION

Industry Petitioners' argument that this Court should grant certiorari to review the D.C. Circuit's decision on the State Petitioners' non-delegation doctrine challenge is meritless. Industry Petitioners fail to identify any conflict between the D.C. Circuit's ultimate decision in *Michigan* and the non-delegation jurisprudence of this Court, nor

do they identify any conflict within the D.C. Circuit's jurisprudence.[21]

A. There is No Conflict Between the D.C. Circuit's Holding and This Court's Non-Delegation Doctrine Jurisprudence.

Industry Petitioners, for the first time in this case,[22] raise their claim that EPA's analysis of significant contribution is a constitutionally-impermissible exercise by the Agency of the authority delegated to it by Congress. The D.C. Circuit determined that EPA's significant contribution analysis did not represent a constitutionally impermissible exercise of Agency discretion, and therefore did not run afoul of the nondelegation doctrine, because the Agency's assessment of significance was confined by several technical threshold determinations, and because the resulting rule was limited in its scope. Ind. Pet., App. at 27a-28a.

While Industry baldly claims that the D.C. Circuit has "turned upside-down the principle of unconstitutional delegation," they completely fail to describe any conflict between the D.C. Circuit's ultimate decision on this point and this Court's nondelegation jurisprudence. Indeed, it is Industry Petitioners (and the State Petitioners in the case below) who attempt to "turn the

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[21] Petitioners do not assert that any conflict exists between the D.C. Circuit's *Michigan* holding and decisions of any other Circuit Courts of Appeals.

[22] Industry Petitioners did not raise their nondelegation argument before the D.C. Circuit; State Petitioners did raise the issue below, but do not seek certiorari on that point.

nondelegation doctrine on its head" by using it to analyze Agency actions under delegated authority, rather than to examine the Congressional delegation of authority itself. The nondelegation doctrine consistently has been used by this Court as a constraint on Congressional, not administrative action.[23] Moreover, the Court is currently reviewing the D.C. Circuit's application of the non-delegation doctrine in the context of the Clean Air Act. *ATA*, No. 99-1257.

Assuming, *arguendo*, that it was appropriate for the D.C. Circuit to apply the nondelegation doctrine to analyze the Agency's action in issuing the NOx SIP Call, it is clear that the D.C. Circuit's *Michigan* holding is consistent with this Court's jurisprudence. This Court's nondelegation cases recognize that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). The interstate transport of ozone pollution and its NOx precursor absolutely is the kind of complex technical problem for which the delegation to an agency with substantial technical and scientific expertise is appropriate.

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[23] *See e.g., Loving v. United States*, 517 U.S. 748, 771 (1996); *Touby v. United States*, 500 U.S. 160, 165 (1991); *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928) (the purpose of the nondelegation doctrine is to ensure that important policy choices are made by *Congress*, and that *Congress* has provided "intelligible principles" to guide agency action).

Furthermore, this Court's analysis has never ended at the question whether the delegation of authority to an agency is broad or limited – the Court looks to the overall scope of the delegated authority and the statutory context in which the rules under it are developed. Indeed, agency actions under statutes including broad delegations of authority have consistently been upheld. *Loving v. United States*, 517 U.S. 748, 771 (1996) (*citing National Broad. Co. v. United States*, 319 U.S. 190, 216-217, 225-26 (1943)). There have been only two instances in the history of the non-delegation doctrine in which this Court has struck down a Congressional delegation of authority, and in each of those cases the concern was with completely standardless or limitless delegation, not simply the grant of broad authority.[24] But EPA's decisionmaking in the NOx SIP Call was neither standardless nor limitless – the D.C. Circuit found the Agency had constrained its discretion both by the factors it used to bound its significance analysis, and by the limited geographic scope of the Rule.

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[24] *See Panama Ref. Co. v. Ryan*, 293 U.S. 388, 418, 420, 431-32 (1935); *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 537-542 & 553 (1935) (Cardozo, J. concurring and noting particular concern where the delegated authority extends "as wide as the field of industrial regulation."). And even in *Panama* and *Schecter*, the Court recognized that "legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly." *Panama*, 293 U.S. at 248; *Schecter*, 295 U.S. 495, 529-530. That is precisely the situation presented here – EPA has been delegated a complex problem to solve – a problem involving a host of technical details that Congress could not have efficiently or expertly addressed itself.

Moreover, the delegation of authority to EPA under Sections 110(a)(2)(D)(i)(I) and 110(k)(5) was specifically limited by Congress. Clear boundaries confine EPA's exercise of its discretion in the NOx SIP Call Rule, including the following recognized by the D.C. Circuit: "EPA must find (1) emissions activity within a state; (2) show with modeling or other evidence that such emissions are migrating into other states; and (3) show that the emissions are contributing to nonattainment." Ind. Pet., App. at 28a.

The court also found that because the resulting NOx SIP Call Rule did not "affect the whole economy," a more precise set of standards confining the Agency's action was unnecessary. *Id.* Whatever else one may think of this analysis, it is completely consistent with this Court's nondelegation jurisprudence, which examines not only the standards governing agency action, but the scope of the delegated power. *See, e.g., Synar v. United States*, 626 F. Supp. 1374, 1386 (D.D.C.), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986) (constitutionality of a delegation must be assessed both on the basis of the specificity of the standards governing its exercise and the overall scope of the power granted).

B. The D.C. Circuit's Holding Does Not Represent an Intra-Circuit Conflict.

Industry Petitioners paint a picture of the D.C. Circuit in conflict with itself that is simply incorrect. They allege that the *Michigan* decision is somehow at odds with the D.C. Circuit's previous decisions, particularly *ATA*.

While we disagree strongly with the D. C. Circuit's decision in *ATA*, it certainly is not in conflict with the decision in *Michigan* on the grounds asserted by Industry Petitioners.[25]

The *Michigan* court upheld the Agency's exercise of its authority under a broad delegation not only because the Agency's action was confined by articulated standards,[26] Ind. Pet., App. at 28a, but also because the

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[25] In earlier D.C. Circuit decisions upholding previous EPA significant contribution determinations under the Act, the nondelegation doctrine was not even at issue. *New York v. EPA*, 852 F.2d 574 (D.C. Cir. 1988); *National Asphalt Pavement Ass'n v. Train*, 539 F.2d 775 (D.C. Cir. 1976).

[26] This point is ignored by Industry Petitioners, who simply seize the court's *dicta* (namely the statement that the selection by EPA of the $2000/ton cost-effectiveness cutoff as one element of the significance analysis "is a radically incomplete line-drawing device") to allege an exercise of standardless discretion. Ind. Pet. at 20. But Industry Petitioners significantly fail to note that the court went on to find that EPA had properly limited its action under the statute through three threshold determinations. Ind. Pet., App. at 28a.

Furthermore, while we agree with the D.C. Circuit that EPA's NOx SIP Call Rule was a valid exercise of delegated Agency authority, we do not agree with the court's *dictum* that EPA "understood that its selection of the [cost] cut-off point was essentially unbounded." Ind. Pet., App. at 27a. EPA did not simply pick the $2000/ton figure out of thin air. Rather, it evaluated the cost of NOx emission control options, and found that most "emissions controls that are available and of comparable cost to other recently undertaken or planned NOx [controls] . . . fall below $2000/ton." 63 Fed. Reg. 57,356, 57,400. EPA further explained that "the cost-effectiveness of measures that EPA or States have adopted, or proposed to adopt, forms a good reference point for determining which of the available additional NOx control measures can most easily be

resulting Rule is limited in scope both geographically and because it does not affect all American enterprise. *Id.* at 27a-28a. Industry Petitioners erroneously suggest that this represents a new or different approach taken by the D.C. Circuit to its analysis of agency action under the nondelegation doctrine. Ind. Pet. at 20. It is notable that they provide no citations illustrating the conflict they suggest.

In fact, the court's *Michigan* analysis is completely consistent with previous cases in which the D.C. Circuit (wrongly, we believe) has used the nondelegation doctrine to analyze agency actions under Congressionally-delegated authority. In *ATA*, the court noted its view that where the Agency "standards in question affect the whole economy," a more precise delegation (or more accurately to the situation, a decisional principle more clearly articulated by the Agency) is required. *ATA*, 175 F.3d at 1037 (citing *Schecter*, 295 U.S. 495, 553 (1935)). Similarly, in *Lockout/Tagout I*, 938 F.2d at 1317 (D.C. Cir. 1991), the court remanded a rule precisely because the scope of the agency's claimed power to roam was "immense, encompassing all American enterprise," and, the D.C. Circuit believed, this ran afoul of the nondelegation doctrine. The *Michigan* court, distinguishing those earlier holdings,

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implemented by upwind states whose emissions impact downwind nonattainment problems." *Id.* This approach is analogous to various provisions in the Act requiring sources to install emission control technology that is "reasonably available." *See, e.g.*, 42 U.S.C. § 7502(c)(1) (requiring major sources in ozone nonattainment areas to install "reasonably available control technology").

held not only that the Agency had constrained its decisionmaking,[27] but that the resulting rule does not affect the whole economy. Ind. Pet., App. 28a. *Michigan* therefore does not represent a new approach by the D.C. Circuit, nor is it in conflict with its earlier decisions, and therefore is not worthy of a grant of certiorari by this Court.

More importantly, as noted *supra*, this Court currently is reviewing an important Clean Air Act case in which both the ultimate results of the D.C. Circuit's non-delegation doctrine analysis and its reasoning were inconsistent with this Court's non-delegation jurisprudence. *ATA*, No. 99-1257. That case provides this Court ample opportunity to evaluate how the D.C. Circuit is applying the non-delegation doctrine, making review of the instant case unnecessary.

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[27] In fact, the court's concern in *Lockout/Tagout I*, that the agency's asserted power to make a rule so stringent as to risk taking industry to the verge of economic ruin, *see Lockout/Tagout I*, 938 F.2d at 1317, is clearly not at issue here, where EPA has included the availability of cost-effective NOx controls as one limiting element in its significance determination.

CONCLUSION

For the foregoing reasons, this Court should deny certiorari on the questions presented in the State and Industry Petitions.

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